STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 5, 2009
v	No. 282134 Gogebic Circuit Court
EARL LEVI DIXON, JR., Defendant-Appellant.	LC No. 07-000021-FH

Before: Saad, C.J., and Davis and Servitto, JJ.

DAVIS, J. (*concurring*).

I concur in the result reached by the majority because this Court is constrained to do so, for the reasons stated by the majority. I write separately to articulate some remaining concerns as a result of the holding in *Muttscheler*.

Defendant is a prisoner committed to the jurisdiction of the Department of Corrections. He was charged as a second habitual offender with prisoner in possession of a weapon, MCL 800.283(4), assault with a deadly weapon, MCL 750.82, and aggravated assault, MCL 750.81a(1). Defendant pleaded guilty to attempted prisoner in possession of a weapon in exchange for the dismissal of the other charges and the prosecutor's recommendation of a sentence within the guidelines. The trial court calculated defendant's guidelines range at 2 to 17 months to be served consecutively to defendant's current prison term. Neither party disputed that calculation, but the prosecutor argued that a 12 month minimum was appropriate, while defendant argued that 6 to 30 months was appropriate. The trial court observed that defendant had a history of assaultive offenses, and a weapon was used on the victim in this case, so it sentenced defendant to 12 to 30 months' imprisonment. Defendant contends that, because his guidelines range was for fewer than 18 months, the trial court was required to impose an intermediate sanction. An intermediate sanction precludes imposition of a prison term, irrespective of the minimum sentence length.

Pursuant to MCL 769.34(4)(a) and MCL 769.3(b), if a defendant's minimum recommended sentence range under the sentencing guidelines is 18 or fewer months, the defendant is to receive an intermediate sanction, which is not to exceed 12 months or to include imprisonment in a state prison. However, this defendant was incarcerated in a state prison *at the time he committed this offense*. That is a relatively unique circumstance subject to an additional statute with unique implications.

It is undisputed that, because defendant committed his offenses while incarcerated, his sentence was mandated to be consecutive to the sentence he was currently serving. MCL 768.7a(1). Our Supreme Court has explained that *People v Weatherford*, 193 Mich App 115; 483 NW2d 924 (1992), is of limited applicability to today's legislative sentencing guidelines, because it "was decided in the 'era' of the judicial sentencing guidelines." *People v Muttscheler*, 481 Mich 372, 375; 750 NW2d 159 (2008). Nevertheless, this Court in *Weatherford* articulated valid concerns, and its explanation of the Legislature's intent in enacting MCL 768.7a(1) has validity as well.

The Legislature has explicitly provided that the Code of Criminal Procedure is "remedial in character and as such shall be liberally construed to effectuate the intents and purposes thereof." MCL 760.2. I would hold that *Weatherford*'s analysis, which specifically applies to crimes committed while incarcerated in the state penal system, carries over to the legislative sentencing guidelines and would allow for a consecutive sentence to be served in state prison.

I do not believe the beneficence of an intermediate sanction interpreted as precluding prison confinement should even be applicable to those guilty of assaultive offenses committed in the state prison system. Rather, the special circumstances of these crimes mandating consecutive punishment requires those sentences to be served *in the same system* as well. This Court previously held that the Legislature's "intent would be abrogated by allowing inmates to be taken out of the prison setting where their subsequent crimes were committed and moved to the local county jail to complete the consecutive sentence," thereby "thrust[ing] the responsibility for punishing internal prison crimes onto the local county, an authority far less equipped to handle that responsibility than the prison authority." *Weatherford*, *supra* at 118-119. An intermediate sanction also effectively vitiates the statutory maximum for any given offense: the sentence becomes a determinate sentence for a specified number of months not to exceed 12, which is the institutional limit of county jails.

Reading MCL 768.7a(1) to allow for a mandatorily imposed consecutive sentence to be served in a county jail gives rise to a cornucopia of additional problems. The first concern that comes to mind is the effect this transfer of additional discipline from the state penal system to the county may have on order within the state system. Other concerns include exposing less-serious offenders serving sentences in county jails to harm from (or the adverse influence of) offenders who wind up back in a county facility precisely because they have shown themselves to be dangerous and difficult to control in a more secure state facility. It potentially exposes the public to the unnecessary risk of an inmate's escape during transport. It transfers the cost of confinement from the state to the local county, and is likely to be quite disproportionate in that regard in counties that host state correctional facilities within their boundaries. It may impede the inmate's successful reintegration into society because local facilities lack halfway house and other close monitoring programs typically employed by the state for transition. Further, as previously noted, the defendant's sentence has been served in full upon release from jail.

Local prosecutors understandably seeking to avoid these implications may severely reduce the opportunity for negotiated dispositions, resulting in increased demands on the local court systems. Finally, there is the prospect of potentially longer sentences to a penal system that is already under pressure to reduce prison populations.

Nonetheless, I end where I began. Our Supreme Court has spoken, and local prosecutors and judges are on notice that they will need to adjust their practices accordingly.

/s/ Alton T. Davis